92-782

No.

Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

ROBERT R. AND FEROL M. RODRIGUEZ;

AND

FRANKLIN S. CIBULA, A Law Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Petitioner in pro per

QUESTIONS PRESENTED

The primary questions presented in this petition for certiorari are:

1. Whether the published opinion of the Honorable David E. Russell, U.S. Bankruptcy Judge, Eastern District of California, in which he refused to apply the "plain meaning" rule of statutory interpretation and basically "rewrote" the Code to reflect what he felt it should have said, was correct.

2. Whether the subsequent published opinion of the District Court, which ignored the previous decision of the Ninth Circuit Bankruptcy Appellate Panel in the same case and arrived at a different conclusion, was correct.

3. Whether the Ninth Circuit Court of Appeals erred by affirming, in a single-page decision, both of the above opinions, when the later District Court opinion was in direct conflict with the earlier one.

TABLE OF CONTENTS

Item:	Page No.
QUESTIONS PRESENTED.....	i
LIST OF PARTIES *	
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	3
STATUTES INVOLVED.....	4
STATEMENT OF CASE.....	5
REASONS FOR GRANTING PETITION:	
I. BANKRUPTCY COURT'S PUBLISHED OPINION CONFLICTS WITH CLEAR DIRECTIVES FOR STATUTORY INTERPRETATION THAT HAVE BEEN ESTABLISHED BY THIS COURT.....	18
II. DISTRICT COURT'S OPINION IGNORED WELL ESTABLISHED PRINCIPLES OF LAW AND SETS AN ERRONEOUS PRECEDENT ON A QUESTION OF FIRST IMPRESSION.,,	23
III. THE COURT OF APPEALS DECISION TO AFFIRM BOTH PUBLISHED OPINIONS WAS IN ERROR AS A MATTER OF LAW.....	36
CONCLUSION.....	37

* All parties are listed in the caption.

TABLE OF CITED AUTHORITIES

Cases: Page No.

Badaracro v. Commissioner,
464 U.S. 386, 398 (1984)..... 20

Blum v. Stenson,
465 U.S. 886, 896 (1984)..... 19-21

Board of Education of the Westlake Community Schools v. Mergens,
__U.S.__, 110 S.Ct.2356 (1990).... 19

Burlington N.R.Co. v. Okla. Tax Comm'n,
481 U.S. 454 (1987)..... 19

Caminetti v. United States,
242 U.S. 470 (1917)..... 20

Central Trust Co. v. Official Creditors' Comm. of Geiger Enter,
454 U.S. 354 (1982)..... 20

Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980)..... 20

Crooks v. Harrelson,
282 U.S. 55 (1930)..... 21

Davis v. Michigan Dept of Treasury,
489 U.S. 803 (1989)..... 18

In re De Jesus Saez,
721 F.2d 848 (1st Cir. 1983)
.....27-28-29-30

Garcia v. United States,
469 U.S. 70 (1984)..... 19

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982)..... 18

TABLE OF CONTENTS
(Continued)

Cases: Page No.

Heckler v. Turner,
470 U.S. 184 (1985)..... 19

Johnson v. Home State Bank,
__U.S.__, 111 S.Ct. 2150 (1991)... 22

K-Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988)..... 19

In re Krueger,
88 B.R. 238 (9th Cir.BAP 1988).... 32

In re Mann,
907 F.2d 925 (9th Cir. 1990)..... 34

Mansell v. Mansell,
490 U.S. 581 (1989)..... 19

Patterson v. Shumate,
__U.S.__, 112 S.Ct. 2242 (1992)..21-39

Olson v. Commissioner,
86 T.C. 1314 (1986).....27-30-31

Rubin v. United States,
449 U.S. 424 (1981)..... 20

In re Sweet Transfer & Storage, Inc.,
896 F.2d 1189 (9th Cir. 1990)..... 27

TVA V. Hill,
437 U.S. 153 (1978)..... 19

Toibb v. Radloff,
__U.S.__, 111 S.Ct. 2197 (1991)... 21

United States v. Ron Pair Enterprises,Inc.,
489 U.S. 235 (1989)..... 18

TABLE OF CITED AUTHORITIES
(Continued)

Cases: Page No.

United States v. Smith,
499 U.S.___, 111 S.Ct. 1180 (1991)..22

Weston v. Cibula,
101 B.R. 202 (Bankr. E.D. Cal. 1989)..... 2-15-17-23-36-38

Weston v. Rodriquez,
110 B.R. 452 (E.D. Cal. 1989)..... 2-13-16-17-39

Statutes:

28 U.S.C. § 157(b)..... 9

28 U.S.C. § 158(a)..... 12

28 U.S.C. § 158(b)..... 9

28 U.S.C. § 158(d)..... 14

28 U.S.C. § 1254(1)..... 3

28 U.S.C., F.R.Civ.P. 55..... 5

28 U.S.C., F.R.Civ.P. 62..... 4

11 U.S.C., FRBP 1017(d)..... 4-15

11 U.S.C., FRBP 7055..... 5

11 U.S.C., FRBO 7062...4-11-14-15-22-35-36

11 U.S.C., FRBP 8002(b)..... 5-35

11 U.S.C., FRBP 9014..... 4-15

11 U.S.C., FRBP 9019..... 5

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, JoAnne M. Weston, acting in pro per, respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals, entered in the consolidated cases, Nos. 90-16501 and 91-15360.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is not reported, having been classed as "not suitable for publication." It is reproduced in the Appendix at A-1, 2.

The Ninth Circuit Bankruptcy Appellate Panel's ("BAP") decision in BAP No. EC-89-1604-MeAsJ (C.A. Case No. 91-15360) was also classed as "NOT FOR PUBLICATION", and is reproduced in the Appendix at A-70 through A-72.

The underlying subject order of the above BAP appeal, by the Honorable David E. Russell, Bankruptcy Judge, was reported in Weston v. Cibula, 101 B.R. 202 (Bankr. E.D. Cal. 1989) and is reproduced in the Appendix at A-9 through A-23.

The subject order of the appeal, C.A. Case No. 90-16501, was the opinion of the U.S. District Court, Eastern District of California, reported in Weston v. Rodriquez, 110 B.R. 452 (E.D. Cal. 1989), and affirmed the default judgment of Judge Russell which granted the motion of the Respondents Rodriguez seeking the court's approval of a rescinded settlement agreement. It is reproduced at A-24 through 54.

The subsequent order of the District Court in the case, on granted rehearing, was not reported, and is reproduced at A-55 - 69.

The earlier, related decision by the BAP in the appeal of the order dismissing Petitioner's first case, BAP No. EC-86-1214, was also classed "NOT FOR PUBLICATION", and is reproduced at A-6 - 8. None of the other orders reproduced in the Appendix have been reported, including the orders of the BAP and the Court of Appeals which denied rehearing, which two orders are reproduced at A-73 and A-74, respectively.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on July 2, 1992. (App. A-1) A timely petition for rehearing was denied on September 1, 1992, and the Petitioner's motion for stay was first granted on September 17, with an extension granted on October 19, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case include several Rules of Federal Bankruptcy Procedure ("FRBP"), as well as certain ones of the Federal Rules of Civil Procedure. The case also involves certain well established principles of law re jurisdictional issues and the "law of the case" doctrine, as well as the "plain meaning" rule of statutory interpretation.

FRBP 1017(d) is the controlling Code statute for all proceedings to dismiss or convert a bankruptcy case. The pertinent text is contained in the Appendix at A-16.

FRBP 9014 is the statute which governs all "contested matters", and also makes certain adversary rules applicable to such matters. The relevant text of Rule 9014 is contained in the Appendix at A-17.

FRBP 7062 incorporates Rule 62, Federal Rules of Civil Procedure. The text of the two statutes can be found at A-12 and A-36.

FRBP 9019 governs compromise and settlement of controversy in bankruptcy cases, and its text can be found at A-75.

FRBP 7055 incorporates F.R.Civ.P 55 and governs default judgments in both adversary and contested matters. The relevant text of Rule 55 is at A-75.

FRBP 8002(b) governs the effect of a timely motion to reconsider an order in bankruptcy cases on the notice of appeal re the order. The relevant text can be found at A-75.

STATEMENT OF CASE

Petitioner first filed for bankruptcy protection under a Chapter 11 on March 15, 1985, primarily caused by the misconduct of her former attorney, Franklin S. Cibula, who had conspired with certain adverse parties against the Petitioner's interests. Petition had been embroiled in litigation over a certain real estate project, and had heavily encumbered her own property

to finance the project. When Petitioner discovered Respondent Cibula's betrayal, she discharged him as her attorney. At the time of the Chapter 11 petition, the Respondent Cibula had filed a complaint in state court against Petitioner, seeking his claimed "legal fees", and certain of the above adverse parties, Respondents Rodriguez, were attempting to foreclose upon the two parcels of Petitioner's real property referred to above. Also pending at the time of the petition filing was a civil complaint against Respondents Rodriguez, which had been brought by Petitioner and charged Respondents with usury, breach of contract and wrongful foreclosure. All of these actions were stayed by the filing of the Chapter 11 petition.

Both Cibula and Rodriguez were listed as disputed creditors in the case, and on December 5, 1985, the bankruptcy court

denied Respondent Rodriguez relief from the automatic stay, with the order being entered on December 17. (App. A-3) On December 22, 1985, Rodriguez rescheduled the foreclosure sales of Petitioner's two properties, setting them for February 24, 1986. No notice of the rescheduled date was provided to Petitioner, nor was it published in any county newspaper.

At the December 2, 1985 hearing on the motion for relief, a sua sponte order to show cause why the bankruptcy case should not be dismissed was also heard. The order alleged that no plan had been proposed and was at the request of the estate administrator. As the Petitioner had filed both a disclosure statement and a proposed plan, which had the approval of the unsecured creditors on file, Petitioner's counsel requested that the order to show cause be dismissed and the case allowed to proceed with the disclosure statement hearing.

On January 14, 1986, a sua sponte order dismissing the Chapter 11 case was entered, with copies of the order sent out on that date, which did not show any date of entry. On January 15, Cibula applied for, and was granted, a default judgment in his action against Petitioner for his fees. Cibula promptly utilized the default judgment to record liens against various properties of the Petitioner. On January 17, believing the dismissal order to be a clerical error, Petitioner's counsel served all interested parties with a motion for reconsideration of the dismissal, which was heard and taken under submission on February 19, 1986.

On February 24, Rodriguez proceeded with the rescheduled foreclosure sales, and obtained both parcels of Petitioner's property by a "credit bid" on each. As no one but Rodriguez and the parties involved with conducting the sale were aware of it, there were no other "bidders" present.

On February 27, 1986, the order denying the motion for reconsideration was entered, and Petitioner's timely appeal to the Ninth Circuit Bankruptcy Panel, BAP No. EC-86-1214, was filed on March 5, 1986. The bankruptcy court had jurisdiction over the case pursuant to 28 U.S.C. § 157(b), while the BAP's jurisdiction is derived from 28 U.S.C. § 158(b).

While the appeal was pending, a second Chapter 11 case was filed by Petitioner on October 24, 1986. On February 26, 1987, the BAP issued a conditional order of dismissal in the appeal, EC-86-1214, based on the fact that, if valid, the foreclosure sales by Rodriguez had "mooted" the appeal and called for its dismissal. (App. A-4) Upon learning of the facts surrounding the sales, as detailed above, the BAP WITHDREW the conditional dismissal order. (App. A-5).

Despite the foregoing facts, the Honorable David E. Russell, Bankruptcy Judge,

issued various lift-stay orders in the second case, based upon his conclusion that the sales had occurred while "no bankruptcy case was pending", and therefore that were valid. Petitioner also applealed those orders, and, as was to be the case throughout, all motions for stay pending appeal were denied. Faced with an impending unlawful detainer action by Rodriguez due to Judge Russell's lift-stay order, and the denial by both the BAP and the lower court of her stay pending appeal motions, Petitioner feared that the appeals could all be "mooted", including the first one, BAP No. EC-86-1214. On January 12, 1988, she reluctantly entered into a settlement with Respondents Rodriguez. (App. A-26, 27) The settlement agreement, however, was contingent upon its having no adverse impact upon the appeal, EC-86-1214, and when Petitioner discovered that the agreement would "moot" the appeal, she rescinded

the settlement, serving and filing a "Notice of Rescission". Respondents then brought a motion before the bankruptcy court, seeking its approval for the rescinded settlement, to which Petitioner filed vigorous opposition. Despite the un-filed opposition, Judge Russell granted, by default, the motion for approval, which was entered April 5, 1988. On April 8, in direct violation of the ten-day stay of FRBP 7062, Respondents Rodriguez recorded the settlement documents. Petitioner filed a timely motion pursuant to 9023, seeking to have the default judgment approving the rescinded settlement vacated, which was heard an submitted on May 17, 1988.

On May 20, 1988, the BAP filed its decision in the appeal, EC-86-1214, and it VACATED the dismissal order for not being authorized under the Bankruptcy Code and remanded the reinstated Chapter 11 case to the bankruptcy court. (App. A-6 - A-8)

In an attempt to preserve the status-quo, Petitioner had recorded a lis pendens on the property Respondents Rodriguez were attempting to gain with the rescinded settlement agreement, and on one day's notice, counsel for the Respondents obtained an order from Judge Russell expunging the recorded notice on June 8, 1988. As the motion to vacate the approval was still undecided, and Petitioner had sent a copy of the BAP decision to Judge Russell, a motion to vacate the expungement order was filed by Petitioner, and a second lis pendens was recorded. On June 15, Judge Russell denied the Petitioner's motion to vacate the approval order, and Petitioner timely appealed on June 22, 1988, which was thereafter transferred to the District Court. The jurisdiction of the District Court over bankruptcy appeals is derived from 28 U.S.C. § 158(a).

On Appeal, the District Court ignored

Petitioner's arguments on appeal, and instead, concluded that the foreclosure sales were valid, thereby mooting the real property issues of the appeal. Since the court could not "grant appellant effective relief" (App. A-43), and it was reasonable, under the circumstances, for the bankruptcy court to approve the settlement.

This decision, entered December 13, 1989, was reported as Weston v. Rodriguez, 110 B.R. 452 (E.D. Cal. 1989). Petitioner timely moved for rehearing, which was then granted, and the second order in the case was entered on August 28, 1989. In her motion, Petitioner had pointed out, inter alia, that the prior BAP decision in the appeal EC-86-1214, had VACATED the dismissal order and implicitly determined that the foreclosure sales were not valid in withdrawing the order dismissing the appeal. While acknowledging the arguments raised by Petitioner, which included the argument

that under the "law of the case" doctrine, the prior BAP determination re the foreclosure sales was binding on the bankruptcy court, the District Court still disregarded those arguments and once again affirmed the approval of the settlement by the bankruptcy court. The only aspect of this second order that Petitioner agreed with was the specific ruling that the ten-day stay of FRBP 7062 applied to case dismissal orders, and the matter was timely appealed to the Ninth Circuit Court of Appeals, whose jurisdiction is found under 28 U.S.C. § 158(d).

In the meantime, following the BAP decision in EC-86-1214, Petitioner brought an action against her former attorney, Respondent Cibula, seeking to have the default judgment he had obtained on January 15, 1988, set aside for having been in violation of the ten-day stay of FRBP 7062. Judge Russell refused to set aside the default judgment, writing a rather involved

opinion wherein he determined that despite the fact that under FRBP 1017(d), case dismissals were "contested matters", and that pursuant to FRBP 9014, which governed all such matters, FRBP 7062, along with other adversary rules, was made applicable to contested matters, the ten-day stay of FRBP 7062 did not apply to case dismissal orders because he didn't think Congress intended such a result. Weston v. Cibula, 101 B.R. 202 (Bankr. E.D. Cal. 1989). (App. A-9 - A-23)

On appeal to the BAP, No. EC-89-1604, the primary issue of the appeal was misidentified by the BAP Panel as being the other question of whether or not the automatic stay of § 362(a) remains in effect during the time following a case dismissal and its later reversal on appeal. (App. A-70 through A-72). Stating that the District Court had already decided the issue, the BAP upheld the Weston v. Cibula decision,

citing the Weston v. Rodriguez case. The Petitioner quickly moved for rehearing, and pointed out the error to the BAP, as well as including a copy of the second order of the District Court, which specifically ruled that FRBP 7062 did apply to case dismissal orders, thereby establishing that the District Court case was in direct conflict with the earlier opinion by Judge Russell, which was the subject order of the appeal. The BAP denied the motion for rehearing without comment, and the petitioner appealed to the Ninth Circuit Court of appeals once more. (App. A-73)

The two cases, No. 90-16501 (Weston v. Rodriguez), and No. 91-15360 (Weston v. Cibula), were consolidated by the Court of Appeals, and, along with a related case, No. 91-15722, were submitted on the briefs to the same Circuit Panel on December 13, 1991. Since the later case actually consisted of three BAP appeals, and was as a

direct result of the earlier appeals, as well as being far more complex, Petitioner fully expected that the cases would be determined in order of filing. Instead, the last case was the first one to be determined, with no regard to the earlier cases. The denial of rehearing in that matter forced Petitioner to file the related petition for certiorari, No. 92-416.

On July 2, 1992, six months after the decision in Case No. 91-15722, and four months after rehearing in that case had been denied, the Circuit Panel filed its decision in the earlier two appeals, Cases Nos. 90-16501 and 91-15360. In an echo of the erroneous BAP decision (appealed ib No. 91-15360), the Circuit Panel, in a one-page decision, affirmed both the published opinions; Weston v. Cibula, supra, and Weston v. Rodriguez, supra. (App. A-1, 2). The Petitioner timely applied for rehearing, and, as she had done before the BAP, cited

that fact that the two cases were in conflict, and both could not be affirmed, as a matter of law. The rehearing was denied without comment. (App. A-74) However, Petitioner's motion for a stay pending certiorari was granted, and the mandate is stayed through November 3, 1992.

REASONS FOR GRANTING PETITION

I. BANKRUPTCY COURT'S PUBLISHED OPINION CONFLICTS WITH CLEAR DIRECTIVES FOR STATUTORY INTERPRETATION THAT HAVE BEEN ESTABLISHED BY THIS COURT.

The published opinion of Judge Russell ignores the clear directives of this Court for statutory interpretation. Those well established directives state that the "plain meaning" rule must be applied, absent drafting error or an absurd result. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). In Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989), the Court stated that "[l]egislative history is

irrelevant to the interpretation of an unambiguous statute." Other decisions of this Court also attest to the omnipresence of the "plain meaning" rule. See, e.g., Board of Education of the Westside Community Schools v. Mergens, _U.S._,_, 110 S.Ct. 2356, 2365 (1990); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 299 (1988); Blum v. Stenson, 465 U.S. 886, 896 (1984); TVA v. Hill, 437 U.S. 153 (1978).

See also, Mansell v. Mansell, 490 U.S. 581 (1989) (where the language of the statute is plain and precise, it is conclusive of the statute's meaning, absent "clear evidence that reading the languge literally would thwart the obvious purpose of the Act"); accord, Burlington N.R.Co. v. Okla.Tax Comm'n, 481 U.S. 454, 461 (1987); Heckler v. Turner, 470 U.S. 184, 212 (1985) (courts do not sit to second-guess the course Congress has set and the wisdom of their choices); Garcia v. United States,

469 U.S. 70, 75 (1984) (where the language of the statute is clear, only the most extraordinary showing of contrary intentions justify altering the plain meaning of a statute); Badaracco v. Commissioner, 464 U.S. 386, 398 (1984); ("courts are not authorized to rewrite a statute simply because they might deem its effects susceptible of improvement"); Central trust Co. v. Official creditors' Comm. of Geiger Enters., 454 U.S. 354, 359-60 (1982) (where the statute's language is plain, "the sole function of the court is to enforce it according to its terms" [quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)]; Rubin v. United States, 449 U.S. 424, 430 (1981) (when the terms of a statute are unambiguous, judicial inquiry is complete); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (if the language of the statute is clear and unambiguous, that language must ordinarily

be regarded as conclusive); Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (the remedy for laws thought to be absurd lies with the law-making authority, and not with the courts); Toibb v. Radloff, __U.S. __, 111 S.Ct. 2197 (1991) (when an issue to be decided "turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear", [quoting Blum v. Stenson, supra]) (emphasis added). All of the above cited cases were provided to the Ninth Circuit Court of Appeals in the case No. 91-15360.

The "plain meaning" rule was once again applied by this Court in Patterson v. Shumate, __U.S. __, 112 S.Ct. 2242 (1992), with Justice Scalia applauding the "natural reading" of the statute in his concurring opinion.

In addition, Petitioner had argued before the Court of Appeals that if case

dismissal orders were intended to be excepted from the ten-day stay provisions of FRBP 7062, Congress would have included such orders among the other bankruptcy case orders that Congress had listed as being additional exceptions to the ten-day stay provisions of Rule 62(a). In support of this argument, Petitioner had cited this Court's decision in Johnson v. Home State Bank, __U.S. __, 111 S.Ct. 2150 (1991), wherein the Court held that when Congress expressly prohibited certain serial filings, a form of serial filing not so prohibited was therefore allowable under the Bankruptcy Code. This Court based its ruling on the "absence of a like prohibition on [such] serial filings ... combined with the evident care with which Congress fashioned the express prohibitions ...." In support the Court cited United States v. Smith, 499 U.S.___, ___, 111 S.Ct. 1180, __,(1991) (expressly enumerated exceptions

presumed to be exclusive). Id, at 2156. It also should be noted that the Federal Rules of Bankruptcy Procedure have been amended since case dismissal orders were specifically designated Contested matters. FRBP 7062 was last amended in 1991 with more additions added to the exceptions to the ten-day stay list; case dismissal orders were not among the additional exceptions this time either.

Clearly, the published opinion of the Honorable David E. Russell in Weston v. Cibula, supra, conflicts with this Court's directives for statutory interpretation, and should not have been affirmed by the Ninth Circuit Court of Appeals.

II. DISTRICT COURT'S OPINION IGNORED WELL ESTABLISHED PRINCIPLES OF LAW AND SETS AN ERRONEOUS PRECEDENT, ON A QUESTION OF FIRST IMPRESSION

In her appeal of the default judgment approving the rescinded settlement with Respondents Rodriguez, the Petitioner

argued that the approval order was improper for several reasons, including 10 the mo= tion for approval was not in compliance with the requirements of the controlling FRBP 9019, which states that it is the trustee who must bring the motion; 2) the settlement had been rescinded because it would have mooted the appeal, BAP No. EC-86-1214, and the agreement was contingent upon its having no adverse impact upon the appeal; 3) granting the improper motion by entered default violated the strict provisions of FRBP 7055, made applicable to the proceedings by FRBP 9014; and 4) the bankruptcy court had refused to accept the full implication of the BAP decision in the appeal EC-86-1214 when the lower court considered Petitioner's motion to VACATE the dismissal order.

In its decision of the appeal involving the default approval of the rescinded settlement agreement, the District Court

also ignored the prior BAP decision and the "law of the case" doctrine. As was argued by the Petitioner, the BAP had, in the process of determining the appeal, considered the validity of the foreclosure sales and the fact that they would moot the appeal and cause its dismissal. The validity of the sales had been implicitly rejected by the BAP, and the decision was not appealed. In addition, the BAP had VACATED the dismissal order as not being authorized under the Code. Although it acknowledged that the dismissal had been "reversed" by the BAP, the District Court concluded that the foreclosure sales had not violated the automatic stay, and thus were valid, thereby mooting the real property issues of the appeal. Therefore, the District Court concluded it could not grant the Petitioner "effective relief", and under the circumstances, it was reasonable for the bankruptcy court to grant

the Respondents' motion for approval of the settlement agreement.

On rehearing, the District Court again acknowledged the issues that the Petitioner had raised, but still failed to address them; instead stating that because the Petitioner had not sought a stay pending her motion to reconsider the dismissal of her case, the only stay that had been in effect was the ten-day stay of FRBP 7062, which had run prior to the foreclosures. The Petitioner had argued that although a case could certainly be made for the argument that the automatic stay had never lapsed because the dismissal order was VOID for having failed to meet statutory requirements, (which was why the BAP had VACATE it on appeal), the question she qas raising was the effect the timely motion for reconsideration had had on the effectiveness of the dismissal order. In addition, Respondents Rodriguez had requested relief from

the automatic stay, which was denied prior to the December 22, 1985 rescheduling of the foreclosure sales. (App. A-3) Those sales took place prior to the disposition of the motion to reconsider, and prior to the time anyone could file an appeal of the dismissal order. See FRBAP 8002(b); In re Sweet Transfer & Storage, Inc., 896 F.2d 1189 (9th Cir. 1990). Petitioner contended that because the motion was a proper one, the case was still viable, and the automatic stay was thus still in effect, as to property of the estate.

The District Court cited only two cases as support for its conclusion that the automatic stay had terminated not later than ten days after the entry of the void dismissal order; In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983), and Olson v. Commissioner, 86 T.C. 1314 (1986), which was an unpublished opinion. Neither of these cases actually support the District

Court, as will be demonstrated.

In the Saez case (App. A-35, 36), a creditor foreclosed upon a debtor's home within ten days of the order dismissing the Chapter 13 petition. The debtor filed a motion to reconsider the dismissal, which the bankruptcy court granted, thereafter setting aside the foreclosure. The creditor appealed, and argued that the motion to reconsider had never been served. The district court affirmed, stating that it didn't matter that the motion had not been served; the foreclosure had violated the automatic ten-day stay of Rule 762 (the forerunner of 7062). The Court of Appeals reversed, ruling, inter alia, that Rule 762 only applied to adversary proceedings and contested matters, and the dismissal of the Chapter 13 petition was neither of these. (Saez was decided in 1983, prior to the amendments of 1984 which, through FRBP 1017(d), specifically made dismissals

contested matters).)

The Saez Court, however, decided the case primarily based on the issue of the bankruptcy court's jurisdiction. Because the motion to reconsider, although filed, had not been served, the Court of Appeals ruled that the bankruptcy court ceased to have jurisdiction over the case, and hearing the deficient motion could not restore the lower court's jurisdiction. Since the automatic stay had terminated with the dismissal, the foreclosure by the creditor had not violated the stay. Ass the Saez Court stated: "de Jesus's chapter 13 petition had been dismissed; its revival was dependent on the vitality of de Jesus's motion to reconsider." Saez, 721 F.2d at 854. (Emphasis added)

In the instant case, Petitioner's motion to reconsider was properly served, as was found by the BAP. (App. A-7) Therefore, under the holding of Saez, the motion did

act to "revive" the case, and the automatic stay, which was thus in effect at the time of the foreclosure sales.

As for the other case cited by the District Court, Olson v. Commissioner, 86 T.C. 1314 (1986), that case also fails to support the ruling by the District Court re the motion to reconsider having no effect on the dismissal. In Olson, the debtors argued that the automatic stay remain in effect following the dismissal of their case, until their appeal of the dismissal was denied. The tax court held that since the dismissal order had been affirmed on appeal, there had not been any stay in effect during the pendency of the appeal. In reaching that ruling, however, the Tax Court stated:

> "We do not have the question before us of whether the automatic stay remains in effect during the pendency of a motion for reconsideration of an order of dismissal or during the pendency of a motion for stay pending appeal."

Footnote 4, Olson, 86 T.C. 1314 (1986).

One other note of interest is the fact that the District Court relied on certain findings of fact and conclusions of law, prepared and submitted by counsel for the Respondents Rodriguez almost three months after Petitioner had appealed the default approval of the rescinded settlement. The document was simply a very belated and improper attempt by Respondents' counsel to provide some kind of support for the default approval order. Petitioner's motion to vacate the order was denied on June 15, with the appeal being filed on June 22, while the trumped-up findings and conclusions were signed and filed by Judge Russell on September 13, 1988. Although this fact was pointed out to the District Court, and Petitioner argued that since Judge Russell had no longer had the jurisdiction to sign and file the document, it could not be given any consideration on appeal, the

District Court relied on the document as the "record" for establishing the reasons that the lower court approved the settlement agreement. (App. A-47, 48)

In her argument that a case could be made for the theory that the automatic stay had never lapsed because the order dismissing the case was void, Petitioner cited the only Ninth Circuit case to have considered such an issue; In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988). The District Court stated that Krueger case was not applicable because in Krueger the BAP Panel had held the dismissal order to be void for lack of notice, and in Petitioner's case, she had received notice, so that there was no violation of due process. (App. A-38 - 40)

The District Court missed the point of Petitioner's argument. In Krueger, the BAP Panel explained that an order

which is issued in a manner which violates due process rights, or fails to meet the statutory requirements, is void, and without legal effect. Krueger, 88 B.R. at 239. Since the order was void and without legal effect, the case had never been effectively dismissed, and the automatic stay had thus never terminated, making the creditor's foreclosure invalid for being in violation of the automatic stay.

In the instant case, the record clearly reveals that the BAP Panel also considered the order dismissing Petitioner's case to be void for having failed to meet statutory requirements, and therefore held that it "must be vacated." (App. A-8) The record also reveals that the BAP Panel considered the possibility that the foreclosure sales, if valid, would "moot" the appeal, and call for its dismissal. (App. A-4) The District Court was correct in one respect; if an appellate court cannot grant any

"effective relief" to the appellant, the appeal is moot, and must be dismissed. This principle is well-established in the Ninth Circuit, and a valid foreclosure is certain to moot the appeal. See In re Mann, 907 F.2d 925 (9th Cir. 1990). But in ignoring the prior BAP decision, which established that the dismissal order was void, and the foreclosure sales were not valid, the District Court ignored the "law of the case doctrine: and committed clear legal error in arriving at a different conclusion than did the BAP Panel. To hold otherwise is to hold that the District Court could overturn a prior decision of the BAP, (on the same point, and in the same case), which would mean that the District Court is a higher level in the appellate system than is the Ninth Circuit Bankruptcy Appellate Panel. Such a result would eliminate res judicata, collateral estoppel, and the doctrine of the "law of

the case" when it came to decisions by the BAP, which makes a mockery of the entire Bankruptcy judicial procedures.

One specific ruling that was made by the District Court, however, was considered by the Petitioner to be correct; i.e., that the ten-day stay of FRBP 7062 did apply to case dismissal orders. (App. A-68, 69) One question, however, still remains unsatisfactorily addressed. If a timely motion to reconsider a final order in a bankruptcy proceeding prevents an appeal from being filed until <u>after</u> the entry of the disposition of the motion, pursuant to FRBP 8002(b), and an appellant is given ten days thereafter in which to file the appeal, is the ten-day stay of FRBP 7062 therefore <u>extended</u> by the motion? The Petitioner has found no case law dealing with this question. As with the question of whether or not the automatic stay remains in effect during the pendency of a

motion to reconsider a dismissal order, or thereafter, a motion for stay pending appeal of the dismissal order, there seems to be no case law among the Circuits, and it also appears to be "a question of first impression."

III. THE COURT OF APPEALS DECISION TO AFFIRM BOTH PUBLISHED OPINIONS WAS IN ERROR AS A MATTER OF LAW

The above contentions were presented to the Court of Appeals for the Ninth Circuit by the Petitioner in the Cases 90-16501 and 91-15360. In both cases, the facts establishing that the District Court had specifically ruled that the ten-day stay of FRBP 7062 was applicable to case dismissal orders, thus directly contradicting the earlier bankruptcy court opinion, Weston v. Cibula, supra, were clearly placed before the Ninth Circuit Court of Appeals, both in the appellate briefs of the Petitioner, and the record provided to the Court.

Based upon the above facts, it is very puzzling that the Ninth Circuit Court of Appeals chose to affirm both of the above-referenced cases in its single-page decision of the two appeals, 90-16501 and 91-15360, and took over six months to do so. It is also very puzzling why the re-hearing petition was denied without any comment, when the Petitioner had pointed out the fact that the two decisions were in conflict, and, as a matter of law, they both could not be affirmed, especially with no independent discussion by the Circuit Panel regarding the conflict.

Perhaps the above facts were finally recognized by the Circuit Panel, albeit belatedly, as Petitioner's motion for stay pending certiorari was granted.

CONCLUSION

Without this Court's granting the petition for certiorari, certain events will occur. A clear message will go out

that the "plain meaning" rule of statutory interpretation is no longer espoused by this Court, and the former decisions of the Court which set out the clear directives of statutory interpretation, are to now be disregarded, thus allowing any judge to "rewrite" a statute to reflect what that judge feels it should have said.

The published opinion, Weston v. Cibula, 101 B.R. 202, supra, which did "rewrite" the Code, will have been affirmed by two appellate courts, and, by implication, the Supreme Court itself. Thus, the opinion will become an authoritive case, to be cited by other courts wishing to usurp the role of Congress and become "law-makers", rewriting the statutes to suit their ideas, rather than accepting what Congress has enacted and applying it.

This, in turn, will clutter the courts of appeal, and presumably this Court also, with cases involving questions of statutory

interpretation, and, to paraphrase Justice Scalia, the symbol of the judicial profession will not "remain the scales", but will become "the see-saw." Pattersonv. Shumate, __ U.S. __. 112 S.Ct. 2242, 2251 (1992), Justice Scalia concurring.

In addition, the important questions presented in the other case, Weston v. Rodriquez, 110 B.R. 452, supra, which were either not addressed by the District Court, or erroneously answered, will also remain to be faced another day. Which they will, as the case has set an erroneous precedent on certain questions of first impression among the Circuits, and that case, also, will have been affirmed by the Ninth Circuit Court of Appeals, and, by implication, the Supreme Court of the United States. It also will be accorded the status of an "authority", to be cited by other parties.

In order to prevent the above events from occurring, the petition foe certiorari

should be granted, thus once again acting to support the former decisions by this Court establishing the "plain meaning" rule of statutory interpretation,

Based upon the foregoing reasons cited above in this petition, Petitioner respectfully prays that this petition be granted, and a writ of certiorari be issued to review the decision of the Ninth Circuit Court of Appeals in the instant two cases.

Respectfully submitted on this 27th day of October, 1992.

JoAnne M. Weston,

Petitioner in pro per

92-782

No.

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

IN THE

UNITED STATES SUPREME COURT
October Term, 1992

JOANNE M. WESTON,
Petitioner,
vs.

ROBERT R. and FEROL M. RODRIGUEZ;
AND
FRANKLIN S. CIBULA, A Law Corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION

JoAnne M. Weston
414 Chestnut Street
Mount Shasta, CA 96067
(916) 926-4021 or 4410
Petitioner in pro per

APPENDIX

TABLE OF CONTENTS

Item: Page No.

Ninth Circuit Court of Appeals Decision in the Consolidated Appeals, No.90-16501 & 91-15360..... A-1

Bankruptcy Court Denial of Stay Relief Motion Filed by Respondents Rodriguez..... A-3

BAP Conditional Order of Dismissal re Appeal BAP No. EC-86-1214..... A-4

BAP Order WITHDRAWING Conditional Order of Dismissal of Appeal..... A-5

BAP Decision in BAP No. EC-86-1214.... A-6

Bankruptcy Court's Published Opinion (Appeal No. 91-15360)..... A-9

District Court's Published Opinion (Appeal No. 90-16501.....A-24

District Court's Opinion on Rehearing (Appeal No. 90-15601.....A-55

BAP Decision in BAP No. EC-89-1604 (Appeal No. 91-15360).....A-70

BAP Denial of Rehearing Motion (Appeal No. 91-15360).....A-73

Ninth Circuit Court's Denial of Rehearing (Nos. 90-16501 & 91-15360)..A-74

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Entered July 2, 1992)*

In re:

Weston v. Rodriguez _____/ Case No. 90-16501
D.C. CV 88-1441 MLS

Appeal from U.S. District Court,

Eastern District of California;

and

Weston v. Cibula _____/ Case No. 91-15360
BAP EC 89-1604 MeAsJ

Appeal from the Ninth Circuit

Bankruptcy Appellate Panel

(Consolidated by the Court of Appeals)

BEFORE: NORRIS, BEEZER, and LEAVY, Cir. Judges

(Submitted on December 13, 1991)**

In these consolidated pro se appeals Joanne Weston ("Debtor") argues, inter alia, that the district court erred by affirming the bankruptcy court's approval of a settle-

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* ~~Not suitable for~~ publication.

** Submitted without oral argument.

ment agreement she entered into with the creditors who had foreclosed on her properties during the pendency of her first appeal to the Bankruptcy Appellate Panel ("BAP"), and that the BAP erred by affirming the bankruptcy court's refusal to set aside a state court default judgment obtained by her former attorney, Frank Cibula ("Cibula"), within ten days of the bankruptcy court's dismissal of her first Chapter 11 filing. Because we adopt the careful analyses of the bankruptcy and district courts set out in their well reasoned opinions, Weston v. Cibula (In re Weston I), 101 Bankr. 202 (Bankr. E.D. Cal. 1989), aff'd, 123 Bankr. 466 (Bankr. 9th Cir. 1991); and Weston v. Rodriquez (In re Weston II), 110 Bankr. 452 (E.D. Cal. 1989), and because we find no merit to any of Debtor's remaining arguments, the decisions appealed from are hereby

AFFIRMED.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	No. 285-00957-D-11
JOANNE M. WESTON,	Motion No. HSM-1
Debtor.	ORDER DENYING RELIEF FROM AUTOMATIC STAY
_____/	

(Entered on December 17, 1985)

The motion of movants Robert R. Rodriguez and Ferol M. Rodriguez for, inter alia, relief from automatic stay was heard on December 2, 1985, in the above entitled court. After hearing the evidence and the arguments of counsel the court filed findings of fact and conclusions of law, in accordance with which it is

ORDERED, ADJUDGED AND DECREED that the automatic stay of § 362(a) of the Bankruptcy Code shall remain in full force and effect as to movants Robert R. Rodriguez and Ferol M. Rodriguez, and that the Motion for Relief from Automatic Stay of said movants is denied.

Dated: 12/16/1985 Judge Loren S. Dahl

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. EC 86-1214
JOANNE M. WESTON,	Bank. No. 285-00957-D-11
Debtor/Appellant.	CONDITIONAL ORDER OF DISMISSAL

(Entered on February 26, 1987)

Before: Calvin K. Ashland, Bank. Judge

It appears from the file in this appeal that a Trustee's Sale was held on February 24, 1986, following an order to dismiss the debtor's Chapter 11 petition. Therefore, it appears that this appeal may be moot. It is hereby

ORDERED that the Appellant provide a written explanation within 20 days from the date of this order to show cause why this appeal should not be dismissed as moot. Please submit an original and three copies, and proof of service on opposing counsel, of the response to this order.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. EC 86-1214
JOANNE M. WESTON,	Bank. No. 285-00957-D-11
Debtor/Appellant.	ORDER
_____/	

(Entered April 9, 1987)

Before: Mooreman and Meyers, Bank. Judges

The February 26, 1987, Conditional Order of Dismissal is hereby

WITHDRAWN.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

JOANNE M. WESTON,
Debtor/Appellant.
_____/

BAP No. EC 86-1214

MEMORANDUM

(Filed May 20, 1988)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

This is an appeal from the trial court's sua sponte dismissal of Debtor-Appellant Joanne M. Weston's ("Weston") Chapter 11 case. The trial court dismissed the filing after Weston was unsuccessful at filing disclosure statements and a plan which complied with the requirements of the Bankruptcy Code ("Code"). We REVERSE the trial court.

We begin by noting that this appeal is timely. The Appellant's motion for reconsideration, although not authorized by

name in the Bankruptcy Rules, is properly considered a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 9023. See In re Curry and Sorensen, Inc., 57 B.R. 824 (9th Cir. BAP 1986). Rule 59(e) requires a movant to serve the motion "not later than 10 days after entry of the judgment." This appeal is from an underlying judgment entered on January 14, 1986. The proof of service attached to the Appellant's motion to reconsider indicates that on January 17, 1986 the motion was served by mail. The motion was timely under Rule 59(e) and Bankruptcy Rule 9023 and, therefore, the motion tolled the time to file the notice of appeal under Bankruptcy Rule 9023.

Section 1112(b) indicates that the court may only dismiss or convert a case

on application from an interested party. 11 U.S.C. § 1112(b) (Supp IV 186)[1]; see In re Moog, 774 F.2d 1073, 1079 (11th Cir. 1985); In re Warner, 30 B.R. 528, 529 (9th Cir. BAP 1983). In this case, application was made by the estate administrator. The estate administrator is not an interested party. See In re Gusam Restaurant Corp., 737 F.2d 274, 275 n.1 (2nd Cir. 1984). The trial court's dismissal was, therefore, not authorized by section 1112(b) and must be vacated.

The order dismissing the underlying case is VACATED and the case is REMANDED for proceedings consistent with this decision.

---

[1]Recent amendments to the Code have affected the application of § 1112(b) by specifically allowing the court to act sua sponte whether or not the Code requires application by a party in interest. (Citations omitted) The change in the Code was not effective at the time of this dismissal or the filing of the notice of appeal. (Citations omitted)

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 285-00957-B-11
JOANNE M. WESTON, dba Weston Enter.,	Motion No. JMW-8
vs.	(To reconsider Court's Intended Decision on Motion No. JMW-6)
FRANKLIN S. CIBULA, a Law Corporation./	ORDER DENYING MOTION

(Entered April 27, 1989)

[Published, 101 B.R. 202 (1989)]

The following relevant and material facts are undisputed by the parties for the purpose of this motion. In February 1983 Joanne M. Weston (hereinafter "Debtor") hired Franklin S. Cibula, a law corporation (hereinafter "Cibula"), as legal counsel to assist her in resolving certain disputes. The Debtor subsequently became suspicious of Cibula's conduct and ultimately terminated his employment sometime in December of 1984. On February 19, 1985, Cibula served Debtor with a complaint ("Complaint")

for attorney's fees which was pending in the Municipal Court of Redding in Shasta County, California. Debtor subsequently filed a voluntary Chapter 11 petition in bankruptcy with this court March 15, 1985.

An order dismissing the case due to an unreasonable delay by the Debtor to propose a Plan was entered by this court on January 14, 1986 and notice of the dismissal was mailed on the same day to the Debtor and her creditors. Although properly notified of the court's order to dismiss her case, Debtor never moved for a stay pending appeal as provided for in Bankruptcy Rule ("B.R.") 8005. On January 15, 1985, Cibula filed for and received a default judgment against Debtor in the above referenced Municipal Court of Redding. Cibula also filed an attachment lien against a cause of action and judgment being pursued by the Debtor in the Siskiyou County Superior Court on January 15, 1986.

Debtor subsequently filed a motion requesting this court to reconsider its order of dismissal on January 28, 1986. That motion having been denied on February 27, 1986, the Debtor filed an appeal with the Ninth Circuit Bankruptcy Appellate Panel ("BAP") on March 5, 1986. The BAP eventually overturned this court's order to dismiss on May 20, 1988[1] and an Order Reopening Case was subsequently filed on July 18, 1988.

ISSUE

The pertinent issue before this court is whether Cibula's recovery of a judgment against the Debtor and attachment of the judgment lien against her property within ten days of the entry of the order to dismiss her Chapter 11 case violated the ten day stay against enforcing judgments imposed by B.R. 7062.

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[1] The BAP found this court's dismissal was unauthorized by 11 U.S.C. § 1112(b) because the application to dismiss was made by the estate administrator rather than an "interested party" as required by that section.

ANALYSIS

In its original order, this court relied upon the reasoning set forth in In re De Jesus Saez 721 F.2d 848 (1st Cir. 1983) for the proposition that the automatic stay lifts immediately upon the effective date of an order of dismissal rather than, as the Debtor herein suggests, after the expiration of the ten day period prescribed by Federal Rule of Civil Procedure ("F.R. Civ.P.") 62(a)[2] (made applicable by B.R. 7062[3]).

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[2]F.R.Civ.P. 62 provides in pertinent part as follows:"(a) Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."

[3]B.R. 7062 provides as follows: "Rule 62 F.R. Civ.P. applies in adversary proceedings except that an order granting relief from an automatic stay provided by §362, §922, or §1101 of the Code, an order authorizing or prohibiting the use of cash collateral or property of the estate under §363, and an order authorizing the trustee to obtain credit pursuant to §364 shall be additional exceptions to Rule 62(a)."

The facts in Saez are substantially similar to those now before this court for reconsideration. In that case the bankruptcy court granted a creditor's motion to dismiss the Debtor's Chapter 13 petition for "failure to prosecute" the bankruptcy on May 11, 1981. (721 F.2d 848, 850). Despite the fact that the Debtor filed a motion for reconsideration on May 13, 1981, a previously scheduled auction of the Debtor's residence took place the following day.

The bankruptcy court subsequently granted the motion for reconsideration and held, inter alia, that although the automatic stay "unquestionably...ceased to protect the debtor" against the acts of creditors upon the dismissal of the case (citing 11 U.S.C. § 362(e)(2)[4] (sic)), the creditors

[4]Although there once was a §362(e)(2) under the Bankruptcy Code, reference to that section in the context of the issue being discussed makes no sense. The court was undoubtedly referring to 11 U.S.C. ¶362(c)(2) [quoted text omitted].

were nonetheless in violation of Bankruptcy Act Rule 762 (now B.R. 7062) as the public sale of the Debtor's property occurred within ten days of the order dismissing the case. (In re Saez 13 B.R. 605, 606-07 (Bkrtcy.D.P.R. 1981)). The bankruptcy court concluded that the sale of the Debtor's property was "null and void and without legal effect". (Supra, at 607).

The Court of Appeals subsequently reversed the bankruptcy court's decision. Although it agreed that unless extended by Rule 762 or in some other manner the automatic stay "plainly terminates upon dismissal of the petition giving rise to it" (citing 11 U.S.C. §362(c)), it found that Rule 762 did not apply to an order dismissing a case for failure to diligently prosecute the bankruptcy case. In reaching the latter proposition, the court reasoned that although Rule 762 applied to adversary proceedings as well as to "all proceedings

related to a contested petition and in all proceedings to vacate an adjudication" (Referring to the express language of Bankruptcy Act Rule 121[5], now B.R. 1018), a simple order to dismiss for failure to prosecute did not qualify as either, Consequently, the court found that Rule 762 did not govern such a proceeding.[6]

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[5]Rule 121 provided in pertinent part that "Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules in Part VII apply in all proceedings relating to a contested petition and in all proceedings to vacate an adjudication; Rules ... 762 ... For the purpose of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition or proceedings to vacate an adjudication ...."

[6]Specifically, the court found that "... the dismissal did not arise from a contest over de Jesus's eligibility for chapter 13 relief or the like. Rather, de Jesus's petition was dismissed simply for her failure to prosecute her case in a diligent manner. Under these circumstances, the rules did not require creditors to delay further from exercising their pre-petition rights." (721 F.2d 848, 852).

Although there might have been some question as to whether a motion to dismiss a bankruptcy petition for want of prosecution was either a contested matter or a "proceeding related to a contested petition" under the Bankruptcy Act, the modified rules promulgated under the Bankruptcy Reform Act of 1978 and in effect at all relevant times for the purpose of this motion specifically provided that "[a] proceeding to dismiss a case or convert a case to another chapter is governed by Rule 9014". (B.R. 1017(d)[7]). Thus, because Rule 9014 governs "contested matters"[8], the natural interpretation of Rule 1017(d) as it existed on the date of dismissal of the instant case is that all proceedings to dismiss or convert a case were intended to constitute "contested" proceedings.

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[7]Rule 1017(d) was subsequently amended in 1987 to provide that dismissals or conversions pursuant to §§706(a), 707(b), 1112(a), and 1307(b) would not

Because the Debtor's petition was dismissed by this court pursuant to 11 U.S.C. §1112(b)[9], and because such a proceeding was governed by B.R. 9014, this court must agree with the Debtor that the proceeding to dismiss Debtor's petition constituted a

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automatically be characterized as a contested matter under Rule 9014. Rather, conversion or dismissal under those sections would be governed by Rule 9013 which does not require a hearing absent court order.

[8]Rule 9014 provides in relevant part as follows:

"In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought ... The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply; ... 7062 ...."

[9]§ 1112(b) provides in pertinent part:

§ 1112. Conversion or dismissal.

(b) Except as provided in subsection (c) of this section [inapplicable to this analysis], on request of a party in interest or the United States trustee, and after notice and a hearing, the court may ... dismiss a case under this chapter, ... for cause, including - (3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court[.]

"contested matter" under that Rule. Despite the fact that B.R. 7062 is made expressly applicable to contested matters by Rule 9014, however, this court cannot accept the Debtor's conclusion that B.R. 7062 was intended to apply specifically to B.R. 1017(d) dismissal orders.

As a preliminary matter, this court agrees with the Saez court's analysis of the effect of an order of dismissal upon the automatic stay; namely, that the automatic stay is immediately terminated (11 U.S.C. §362(c)(2)(B)) at the moment the order dismissing the case is entered on the docket (B.R. 9021 [incorporating F.R. Civ.P 58]). (Supra, 721 F.2d at 851). This court furthermore agrees that this interpretation jibes with the provisions of 11 U.S.C. §349(b)[10] which defines the

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[10] §349(b) provides in pertinent part:
(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title [inapplicable to this analysis] -

effect of an order of dismissal. Thus, the plain language of both of the above referenced code provisions serves to contradict the Debtor's suggestion that B.R. 7062 was designed to prevent the automatic stay from lifting immediately upon the dismissal of the case.

Furthermore, F.R.Civ.P. 62(a) (upon which B.R. 7062(a) was expressly based)

---

(1) reinstates -
(A) any proceeding or custodianship superseded under section 543 of this title;
(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
(C) any lien voided under section 506(d) of this title;
(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550 or 553 of this title; and
(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The Legislative history defines the "basic purpose" of subsection (b) as one of "undo[ing] the bankruptcy case, as far as practicable, and restor-[ing] all property rights to the position in which they were found at the commencement of the case." (H.R. Rep. No. 95-595, 95th Cong., 1st Sess 337=38 (1977); S.Rep. No. 95-989, 95th Cong.. 2d Sess 48-49 (1978)).

does not purport to stay proceedings which do not involve the enforcement of a judgment. (11 Wright and Miller, Federal Practice and Procedure, §2901). Rather, Rule 62(a) was designed to carve an exception to the general rule that a court's judgment becomes effective and, consequently, enforceable when the order is entered on the docket by prohibiting creditors from enforcing certain judgments for a period of ten days following the effective date of the order. Clearly such an exception is superfluous in the context of an order dismissing a complaint as such a judgment generally eliminates a cause of action rather than rendering one enforceable.

Consequently, unable to discern any express or implied manifestations of intent that B.R. 7062 was designed to enlarge the limited application of F.R.Civ.P. 62(a) as described above, this court must find that the ten day stay within those rules

was not intended to apply to orders involving the dismissal of bankruptcy petitions without a contrary order of the court. Therefore, because no stay was imposed by Rule 7062, and because the Debtor never secured a stay pending appeal, Cibula was free to pursue his state court remedies with complete immunity immediately upon the effective date of the dismissal.[11] (See In re Lashley, 825 F.2d 362 (11th Cir. 1987) (bankruptcy court could not retroactively void foreclosure sale to enable Chapter 13 debtors to pursue appeal in absence of stay pending appeal); Norton v.

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[11]Debtor's assertions that this court is bound by comments made on the record and in findings of fact in unrelated proceedings within her bankruptcy case is without merit. The doctrine of "the law of case" applies only to rulings made by an appellate court and does not apply to rulings by the trial court. (5B C.J.S. Appeal and Error, §1821 (citations omitted)). In any event, the statements rendered by this court regarding the effect of an order of dismissal upon the automatic stay were pure dicta and, because they were made in the context of an unrelated motion and between unrelated parties, the doctrines of res judicata and collateral estoppel would not apply.

Hoxie State Bank, 61 B.R. 258 (Bkrtcy.D. Kan. 1986) (in accord); Matter of Bluford, 40 B.R. 640 (Bkrtcy.W.D. Mo. 1984) (automatic stay does not remain in effect for ten days following dismissal of Chapter 13 petition); In re Linton, 35 B.R. 695 (Bkrtcy.D.Idaho 1983) (perfection of security interest in collateral within 10 days of order dismissing Chapter 13 case held enforceable); In re Weatherfield Farms,Inc., 34 B.R. 435 (Bkrtcy.D.Vt. 1983) (absent order staying dismissal of Chapter 11 case, stay terminated upon dismissal and mortgagee was restored to position it assumed at the commencement of the case); Contra In re Cooper, 16 B.R. 19 (Bkrtcy.W.D.Mo. 1981) (repossession and sale of automobile within 10 days of dismissal constituted a violation of stay); But c.f. In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988) (stay held to remain in effect thereby rendering foreclosure sale void where dismissal order

was issued in violation of debtors' right to due process)[12].

DISPOSITION

The above discussion shall constitute this court's findings of fact and conclusions of law. Consistent with the above analysis, it is hereby

ORDERED that the Debtor's motion for reconsideration be and is hereby DENIED.

Dated April 21, 1989 /s/ David E. Russell

Judge, United States Bankruptcy Court

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[12]Debtor's contention that Krueger is binding on this court under the facts of this case must be rejected. Krueger stands for the proposition that an order issued in violation of a debtor's constitutional rights to notice may properly be rendered void. As the Debtor does not allege any violation of her rights to due process, the exception delineated in Krueger does not apply. (In re Krueger, supra, 88 B.R. 238).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

In re:

JOANNE M. WESTON, CIV S-88-1441-MLS

Appellant,

vs.

ROBERT & FEROL RODRIGUEZ, MEMORANDUM OF DECISION AND ORDER

Appellees.

_____/

(Entered December 12, 1989)

[Published, 110 B.R. 452 (E.D. Cal. 1989)]

This case is before the court on debtor's appeal from orders of the United States Bankruptcy Court, Eastern District of California in Bank. Case No. 286-05445-B-11. Appellant is Joanne M. Weston appearing in propria persona. Appellees are Robert and Ferol Rodriguez appearing in propria persona.

Appellant seeks review of orders of the bankruptcy court on a number of grounds which are enumerated below. Prior to the

hearing on the appeal, the court ordered the matter submitted on the papers pursuant to Local Rule 230(h). The court, having considered the arguments in the papers submitted on this appeal, now renders its decision.

I. **FACTUAL AND PROCEDURAL BACKGROUND**

In January, 1980, appellees loaned $80,000 to appellant. The loan was secured by appellant's real property. Later, the parties filed several actions in state court including a foreclosure action by appellees.

On March 15, 1985, appellant filed a Chapter 11 bankruptcy case ("Weston Bankruptcy I"). On January 14, 1986 the bankruptcy court, sua sponte, entered an order dismissing Weston Bankruptcy I. No stay of this order was obtained, although appellant moved for reconsideration; the motion was taken under submission on February 19 and subsequently denied on February 27. In the meantime, on February 24, appellees proceeded

with foreclosure sales in state court pursuant to the dismissal order, and thereby obtained title to the two real property parcels in question.

On March 3, 1986 appellant filed a notice of appeal of the order dismissing Weston Bankruptcy I but did not obtain a stay pending appeal. On May 20, 1988 the Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's dismissal and reinstated Weston Bankruptcy I.

While Weston Bankruptcy I was on appeal, appellant filed a second bankruptcy case)"Weston Bankruptcy II") on October 24, 1986. The court lifted the automatic stay so that appellees could proceed with an unlawful detainer action on the property to which they had gained title by foreclosure. Appellant appealed the order lifting stay.

On January 12, 1988 appellant and appellees entered into a settlement agreement in which appellees quitclaimed to appellant

their interest in appellant's home and appellant quitclaimed to appellees her interest in the commercial property.[1] In addition, appellant agreed to dismiss two pending state court actions and agreed to withdraw a lis pendens in order to wind up all proceedings. Appellees agreed to dismiss a cross-complaint in the state court action and to withdraw their opposition to appellant's bankruptcy action. Appellees fully complied with the settlement agreement including quitclaiming to appellant their interest in appellant's home. Appellant has made several attempts to rescind and unwind the settlement agreement, including challenging the approval of the settlement on numerous grounds in the instant appeal.

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[1] Appellant did not have any interest in the commercial property since appellees had obtained title to the property by foreclosure but appellees apparently thought it prudent to request a quitclaim of any interest that appellant might claim.

On May 24, 1988 appellant filed a lis pendens on the commercial property to which appellees had received title by the foreclosure action. On June 8, the bankruptcy court granted appellees' motion to expunge the lis pendens. On June 9, appellant filed another lis pendens on the commercial property. On June 28, the court granted appellees' motion to expunge the second lis pendens.

Meanwhile, appellant filed a motion for an order vacating the order approving the settlement and compromise. The bankruptcy court denied appellant's motion on September 13, 1988 and found that the settlement agreement was fair and equitable in all respects and binding on all parties and that to the extent the settlement agreement dealt with real property, it was appellees' real property and not subject to the bankruptcy court's jurisdiction. Appellant then appealed this decision. When appellees

objected to the appeal to BAP, the appeal was transferred to this court.

This court issued two orders in this case after transfer here. First, appellees were originally represented by John Bessey of Hefner, Stark and Marois. On August 11, 1989 this court granted the motion of Hefner, Stark & Marois to be relieved as counsel of record. Second, appellant's ex-parte motion to stay proceedings in the underlying bankruptcy cases pending this court's review of her appeal was denied because appellant failed to show that the estate would be irreparably injured if a stay was not granted.

Appellant alleges on appeal that:

1) Appellees' motion for approval of compromise and settlement was not brought in compliance with Bankruptcy Rule 9019;

2) The bankruptcy court disregarded the debtor/appellant's notice of rescission and her opposition when it granted the motion for approval of compromise and

settlement;

3) The bankruptcy court improperly granted appellees' motion for approval of compromise and settlement;

4) The bankruptcy court abused judicial procedure by failing to analyze whether the settlement was in the estate's best interest;;

5) The bankruptcy court did not have jurisdiction to consider the motion for approval of compromise and settlement because an appeal was pending before BAP;

6) The bankruptcy court did not have jurisdiction to grant the motion to expunge the lis pendens;

7) The creditors/appellees' "clear violations of the stay provisions" were ignored by the bankruptcy court;

8) The bankruptcy court could not issue an order relating to the real property because it did not have jurisdiction;

9) The bankruptcy judge improperly issued orders without submitting proposed

findings and conclusions to the district court for de novo review;

10) The bankruptcy court disregarded the legal effect of a motion to amend or alter judgment under F.R.Civ.P. 59(e) throughout the proceedings;

11) The bankruptcy court did not have the power to expunge the filed lis pendens on the property since the property was still part of the estate pursuant to appellant's theory that the automatic stay did not terminate;

12) The bankruptcy judge abused his discretion by saying that the lis pendens filing was "not only improper but perhaps contemptuous misconduct"; and

13) The bankruptcy judge's statement as set forth above was threatening and therefore the statement violated her due process rights.

II. STANDARD OF REVIEW

An appellate court reviews a bankruptcy

court's conclusions of law de novo, and it reviews the bankruptcy court's findings of fact under the clearly erroneous standard. In re Comer, 723 F.2d 737, 739 (9th Cir. 1984). The bankruptcy court's order approving a trustee's application to compromise a controversy is reviewed for an abuse of discretion. In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986).

III. DISCUSSION

A. The Automatic Stay Terminated upon Dismissal.

Although not emphasized in appellant's statement of issues, a key issue in these appeals is whether appellees' foreclosure on the real property which secured a loan from appellees to appellant violated the automatic stay. Appellant's argument appears to be that the automatic stay of Weston Bankruptcy I continued during the time she was appealing the dismissal since the dismissal was reversed and the case was

reinstated. She appears to argue that the dismissal was null and void and therefore the automatic stay never lapsed. However, appellant cites no authority for this.

The issue of whether the automatic stay is effective between the time of dismissal of a bankruptcy case and the granting of a reversal on appeal appears to be a question of first impression in the Ninth Circuit. However, one circuit and other courts have addressed the issue.

The Bankruptcy Code provides for an automatic stay of proceedings until the earlier of the time the case is closed or the case is dismissed. 11 U.S.C. § 362(c)(2)-(3). The Code states that the effect of a case dismissal is to revest the property of the estate in the entity in which the property was vested immediately before the commencement of the case under this title. 11 U.S.C. § 349(b)(3). The legislative body intended that this

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provis[illegible] 'undo the bankruptcy case, as far as pr[illegible] able, and restore all property right[illegible] the position in which they were found[illegible] e commencement of the case." H.R. R[illegible]. 95-595, 95th Cong., 1st Sess. 338 ([illegible]; S. Rep. No. 95-989, 95th Cong., 2d Se[illegible]-49 (1978), reprinted in 1978 U.S. C[illegible]ong. & Admin. News, 5787, 5835, 6294. [illegible]over, the bankruptcy rules provide [illegible] debtor can obtain a stay pending a[illegible] !! U.S.C. Rule 8005.

T[illegible]gislative history and structure of th[illegible] indicates that dismissal of a case [illegible] terminate the automatic stay. The c[illegible]s say that a dismissal is intende[illegible]put the parties in the place in which [illegible] were before the bankruptcy case was f[illegible] Moreover, since the drafters inclu[illegible]ovisions for a stay pending appea[illegible] Code's structure indicates that [illegible]rafters considered that certain decis[illegible] were final. Therefore, the

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drafters wanted to provide the debtor with a method of forestalling the effects of a final decision by allowing the debtor a stay pending appeal.

In In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983), the court addressed a factual situation similar to the one in this case. On May 11, 1981 the bankruptcy court dismissed the debtor's Chapter 13 petition for failure to prosecute the bankruptcy. On May 13, the debtor filed a motion for reconsideration. Despite the motion for reconsideration, a previously scheduled auction of the debtor's residence took place. The bankruptcy court later granted the motion for reconsideration and held that the sale was in violation of the ten-day period provided in Bankruptcy Rule 762[2]. The Court of Appeals reversed and held that

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2 Bankruptcy Rule 762 is substantially similar to, and has been replaced by Bankruptcy Rule 7062. Rule 7062 states that Rule 62 of the Federal Rules

automatic stay plainly terminates upon dismissal of the petition giving rise to the stay. In re De Jesus Saez, 721 F.2d at 851.

Similarly, in our case appellant's bankruptcy case was dismissed. Appellant did not obtain a stay pending appeal. Appellees proceeded with their foreclosure action. Therefore, as in In re De Jesus saez, the foreclosure action did not violate the automatic stay because the stay was not in effect at the time the foreclosure took place.

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of Civil Procedure applies in bankruptcy cases." Rule 62 provides in pertinent part:

(a) Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters of patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.

The tax court addressed the issue of when an order of dismissal terminates a bankruptcy case's automatic stay provision for proceedings before the tax court. Olson v. Commissioner, 86 T.C. 1314 (1986). The petitioners argued that their bankruptcy petition was not dismissed until their appeal was denied and therefore the automatic stay was in effect during the appeal. The court held that "absent any order pursuant to Rule 8005, R.B.P., staying the dismissal, the automatic stay terminates upon dismissal." Olson, 86 T.C. at 1318. The court said that the automatic stay is an impermanent "breathing spell" that terminates on dismissal of the case. Id. Accordingly, the Bankruptcy Code reflects this basic rule by requiring that a party obtain a stay pending appeal of a judgment of the bankruptcy court. Id.

The Tax court's discussion supports the argument that the Bankruptcy Code's

structure suggests an intent that a dismissal be final -- thus terminating the automatic stay -- because the Code provides the debtor with a procedure to suspend the effect of a final decision. In our case, appellant's case was dismissed and the automatic stay terminated. Although Bankruptcy Rule 8005 allows a party to seek a stay pending appeal, appellant did not avail herself of this provision and, therefore, the foreclosure sale did not violate the automatic stay. If there are deficiencies in the foreclosure sale itself, her remedies would be in state court.

The Ninth Circuit BAP touched on this issue once in In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988). There, the debtor filed amendments to the bankruptcy plan but was not present at the confirmation hearing. The trustee did not notify the debtor that he would object to the amendments. The court continued the hearing

and instructed the creditor to notify the debtor of the continuance. The creditor failed to notify the debtor of the continuance and the case was dismissed on the trustee's motion for failure to amend the plan as requested. Soon after the dismissal the creditor held a sale of the security. BAP held that the original order dismissing the case was void[3] because it was in violation of the debtor-appellant's due process rights to notice. In re Krueger, 88 B.R. at 241. Futhermore, BAP held that because the original order dismissing the case was void, the stay was in effect continuously from the date the petition was filed. Id.

The Krueger case is distinguishable from the instant action. In our case, the bankruptcy judge held a hearing on his order

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3 The BAP concluded that the order dismissing the case was void for lack of due process. In the instant case, the order dismissing Weston Bankruptcy I was not void for lack of due process.

to show cause why the case should not be dismissed on December 2, 1985. Therefore, appellant was given notice and a hearing before the case was dismissed. This is not a case where appellant was denied an opportunity to be heard before the dismissal. Appellant knew the case was dismissed and filed a motion for reconsideration soon after the dismissal. Appellant could have availed herself of the provision for a stay pending appeal. Moreover, appellant does not allege due process violations with respect to the dismissal order nor are any uncovered upon review of the case. Therefore, the instant case is distinguishable and Krueger does not apply.

As a result of the foregoing analysis, the court concludes that the automatic stay terminated upon dismissal of Weston Bankruptcy I, and the subsequent foreclosure sale by appellees was not in violation of the automatic stay.

B. Real Property Issues are Moot.

The general rule is that an appeal is moot when an appellant has failed to obtain a stay from an order that permits a sale of a debtor's assets. In re Onouli-Kona Land Co., 846 F.2d 1170, 1171 (9th Cir. 1988). This rule developed from: (1) the general rule that an occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot; and (2) the particular need for finality in orders regarding stays in bankruptcy. In re Onouli-Kona Land Co., 846 F.2d at 1172 (quoting Algeran Inc v. Advance Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985)).

There are two exceptions where the general rule is inapplicable. First, there is a narrow exception to the general rule when real property is sold to a creditor who is a party to the appeal and the sale is subject to statutory rights of redemption. In re Onouli-Kona Land Co., 846 F.2d at 1173.

In the present case the property was sold nonjudicially and therefore it is not subject to the statutory right of redemption.[4] Therefore, this exception is inapplicable.

Second, the mootness rule operates only when the purchaser bought an asset in good faith. Id. Lack of good faith is defined as "fraud, collusion ... or an attempt to take grossly unfair advantage of other bidders." Id. Appellant does not allege that appellees did not act in good faith but rather she alleges that they clearly violated the stay provision. This allegation seems to be premised on the argument that the automatic stay was still in effect,

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4 The parties do not state nor do they argue that the foreclosure was a judicial foreclosure subject to the statutory right of redemption. However, the record indicates that the sale was by nonjudicial foreclosure because: 1) appellant did not attempt to exercise her statutory right of redemption; 2) there is no record of a court appointed commissioner selling the property in accordance with California Code of Civil Procedure § 726; and 3) there is no record of appellees having sought a deficiency judgment from appellant.

whereas, as discussed above, the automatic stay was terminated. Because appellant does not allege that the purchase was not in good faith, and because there is no evidence that appellees acted with a lack of good faith, the mootness rule controls.

The bankruptcy court entered an order dismissing the case. The dismissal order permitted appellant's property to be sold by non-judicial foreclosure and sold when there was no stay in effect, the property was not part of the estate. Therefore, assuming arguendo that appellant's arguments have merit, the matters relating to the real property are moot because the real property was sold when no stay was in effect. Consequently, this court is unable to grant appellant effective relief.

C. The Bankruptcy Court had Jurisdiction to Approve the Settlement and Compromise Agreement

The bankruptcy court issued an order granting appellees' motion for approval of

compromise and settlement on March 29, 1988. Appellant argues that the bankruptcy court did not have jurisdiction to grant the motion because of her pending appeal of the dismissal of Weston Bankruptcy I. As discussed above, the real property was not property of the estate and the bankruptcy court did not have jurisdiction over the real property. However, the debtor had two actions pending in state court. These state causes of action were property of the estate, and therefore we must consider whether the bankruptcy court had jurisdiction to approve the settlement or compromise.

A trial court is generally divested of jurisdiction when a matter is on appeal unless the decision is a collateral matter such as the expungement of a lis pendens. In re Thatcher, 24 B.R. 764, 766 (Bankr. E.D. Cal. 1982). The order approving the settlement and compromise in the instant case was issued on March 29, 1988. At that

time appellant's appeal of the dismissal of Weston Bankruptcy I was still pending. Weston Bankruptcy I was not reinstated and consolidated with Weston Bankruptcy II until May 20, 1988. Weston Bankruptcy II was still pending in the bankruptcy court at the time the motion for approval of the settlement and compromise agreement was brought before the bankruptcy court. Therefore, insofar as the court approved the compromise of state causes of action which were property of the estate, the court had jurisdiction to approve the compromise.

D. The Bankruptcy Court's Approval of the Settlement was not an Abuse of Discretion.

A bankruptcy court's order approving an application to compromise a controversy is reviewed for an abuse of discretion. In re A & C Properties, 784 F.2d at 1381. The settlement must be reasonable, given the particular circumstances of the case. Id. (citing In re Equity Funding Corporation of

America, 519 F.2d 1274, 1277 (9th Cir. 1975)). The court must find that the compromise is fair and equitable. Id. When making this determination the court must consider the following factors:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

In the present case, the bankruptcy court issued an order granting an approval of the compromise and settlement on March 29, 1988. The primary assets of the estate were claims against various parties. Because appellant's real property had been foreclosed and sold at a time when no stay was in effect, the property previously owned by appellant was not property of the estate.

The bankruptcy court made findings of fact and conclusions of law in its denial of appellant's Motion for an Order Vacating the Order Approving the Settlement and Compromise in its order entered September 13, 1988. These findings of fact and conclusions of law should be sufficient to establish a record for review of the approval of the settlement since these findings detail the factors considered in upholding the original approval.

First, in making its factual determinations, the bankruptcy court considered that appellant agreed to dismiss two pending state court actions and agreed to withdraw a lis pendens in both cases in order to wind up all proceedings. Second, the court considered that appellees agreed to dismiss a cross-complaint in the state court action and to withdraw their opposition to appellant's bankruptcy action.[5] Third,

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[5] Appellees also had an unlawful detainer action against appellant pending in state court. The

the court also considered that the real property had been foreclosed by appellees at a time when there was no stay in effect. Fourth, the court considered the numerous proceedings that were before the court. Fifth, the court noted that appellees, as part of the settlement agreement, would quitclaim their interest in appellant's home (to which appellees had received title in the foreclosure action). Finally, in reaching its conclusion of law, the bankruptcy court found that the settlement agreement was fair and equitable.

Based on the record, there is sufficient evidence to support a conclusion that the settlement agreement was fair and equitable and in the best interests of the estate. The bankruptcy case embodied

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parties agreed to stipulate to a judgment in favor of appellees, granting them possession of the commercial property in accordance with the parties' agreement that appellees would be given a quitclaim deed to the commercial property.

a three-year-old controversy with numerous proceedings before the court. Appellees agreed to: (1) quitclaim to appellant their ownership interest in appellant's home which they had received by foreclosure; and (2) forego state actions against appellant. In exchange, appellant agreed to forego state actions against appellees. Considering all of the circumstances surrounding the controversy, a conclusion that the settlement was fair and equitable was a reasonable conclusion by the bankruptcy court; therefore, it cannot be said that the bankruptcy court abused its discretion.

E. The Bankruptcy Court had Jurisdiction to Expunge Debtor's Lis Pendens.

Generally, once a matter is appealed, the trial court loses jurisdiction to rule on matters before the appellate court. See Griggs v. Provident Consumer Discount Co., 459 U.S. 58, 59, 103 S.Ct. 400, 402, 74 L. Ed.2d 225 (1982). However, the issue of

expunging a lis pendens is collateral to issues determined in the underlying action and does not fall within the limitation on jurisdiction when an appeal has been taken. In re Thatcher, 24 B.R. 764, 766 (Bankr. E.D. Cal. 1982). Therefore, the bankruptcy court had jurisdiction to expunge the lis pendens recorded by appellant because the lis pendens was collateral to the matters on appeal.

As discussed above, the real property was not property of the estate because it had been foreclosed at a time when no stay was in effect. Therefore, the bankruptcy court's order expunging appellant's lis pendens should not be disturbed. Moreover, a lis pendens may be issued by

> the clerk, or the judge if there is no clerk ... or an attorney of record in the action may sign and issue a notice of pendency of action, or the person causing the notice of pendency of the action to be recorded may obtain certification from the court in which the action is pending that an action concerning real property or affecting the title or the right of possession

> of real property has been filed between the named parties.

Cal. Civ. Proc. Code § 409. Appellant is not an attorney and therefore could not be the "attorney of record". The code provides that a person may request the court to issue a notice of pendency of action or the person may obtain a certification of the pendency of action. In the instant action, appellant did not request the court to issue a notice of pendency of action nor did appellant obtain certification from the court.

The court may expunge a lis pendens on motion of an interested party unless the party recording the lis pendens

> shows to the satisfaction of the court, by a preponderance of the evidence, that ... the action does affect title to or right of possession of the real property described in the notice.

Cal. Civ. Proc. Code § 409.1. A trial court's decision to expunge a lis pendens is reviewed for an abuse of discretion. Mason v. Superior Court, 163 Cal. App. 3d 989, 994

(1985); see also Malcom v. Superior Court, 29 Cal. 3d 518, 521 (1981). It cannot be said that the bankruptcy court abused its discretion when it granted appellees' motion to expunge the lis pendens since the real property was no longer property of the estate and, therefore, there was not an action pending relating to the property. Moreover, appellant did not follow prescribed procedure in recording the lis pendens. See McKnight v. Superior Court, 170 Cal. App. 3d 291, 304 (1985).

Appellant also contends that the bankruptcy judge abused his discretionary powers when he wrote in his order denying appellant's motion to vacate the expungement that the recording of the lis pendens was "not only improper, but perhaps contemptuous misconduct." Appellant charges that this comment was an attempt to intimidate her and in violation of her due process rights. These charges are meritless

and do not warrant discussion.

Accordingly, the court concluc

1. That the automatic stay te: ted upon dismissal of Weston Bankrupt and the subsequent foreclosure sale o: pel- lant's property was not in violat of the automatic stay;

2. That matters on appeal rel to the real property are moot becaus real property was sold when no stay wa effect and this court is unable to grant lant effective relief;

3. That the bankruptcy court uris- diction to approve the settlement com- promise agreement between appella d appellees because Weston Bankrupt was still pending when the motion for oval was brought before the bankruptcy t;

4. That the bankruptcy court ot abuse its discretion when, consid the circumstances surrounding the cor ersy, it approved the settlement agreem and

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5. That expungement of a lis pendens is collateral to issues determined in the underlying action and therefore the bankruptcy court had jurisdiction to expunge appellant's lis pendens.

As a consequence of the foregoing, the orders of the bankruptcy court are affirmed.

IT IS SO ORDERED.

Dated: December 12, 1989

/s/ Milton L. Schwartz

United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

In re:

JOANNE M. WESTON,
Appellant, CIV S-88-1441-MLS

vs.

ROBERT & FEROL RODRIGUEZ,
Appellees. ORDER
[On Rehearing]
_____/

(Entered August 28, 1990)

Debtor and appellant, Joanne M. Weston, seeks reconsideration of this court's order of December 12, 1989 affirming orders entered by the bankruptcy court in the above-captioned bankruptcy case.

I? **BACKGROUND**

In January, 1980, appellees loaned $80,000 to appellant. The loan was secured by two parcels of real property owned by appellant. Later, the parties filed several actions in state court, including a foreclosure action brought by appellees.

On March 15, 1985, appellant filed for

relief in bankruptcy under Chapter 11 ("Weston I"). On January 14, 1986, the bankruptcy court entered a sua sponte order dismissing the bankruptcy case. Appellant moved for reconsideration by the bankruptcy court, although she did not seek a stay of its dismissal order. The motion for reconsideration was taken under submission on February 19 and subsequently denied on February 27. Meanwhile, appellees proceeded with a foreclosure sale in state court pursuant to the dismissal order. The foreclosure sale took place on February 24, and appellees obtained title to the two parcels in question.

On March 3, 1986, appellant filed a notice of appeal of the order dismissing the bankruptcy case. She did not obtain a stay pending appeal. On May 20, 1988, the Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's dismissal and reinstated the bankruptcy case.

Meanwhile, while Weston I was on appeal, appellant filed a second bankruptcy case ("Weston II") on October 24, 1986. The bankruptcy court lifted the automatic stay so that appellees could proceed with an unlawful detainer action against appellant on the property to which they had gained title by foreclosure. Appellant appealed the order lifting the stay.

Then, on January 12, 1988, appellant and appellees entered into a settlement agreement by which appellees quitclaimed to appellant their interest in the residential property involved in the foreclosure and appellant quitclaimed to appellees her interest in the commercial property involved in the foreclosure. In addition, appellant agreed to dismiss two pending state court actions and agreed to withdraw a notice of lis pendens. Appellees agreed to dismiss a cross-complaint and to withdraw their opposition to

appellant's bankruptcy action. Although appellees fully complied with their obligations under the settlement agreement, appellant made several attempts to rescind it, including a challenge to the bankruptcy court's approval of the settlement agreement via an appeal to this court.

On May 24, 1988, appellant filed a notice of lis pendens on the commercial property to which appellees had received title through the foreclosure sale. After the bankruptcy court granted appellees' motion to expunge the lis pendens on June 8, appellant filed another notice of lis pendens on the property on June 9. On June 28, the bankruptcy court granted appellees' motion to expunge the second lis pendens.

Meanwhile, appellant petitioned the bankruptcy court to vacate its order approving the settlement and compromise. In denying this motion, the bankruptcy

court concluded that the agreement was fair and equitable and binding on all parties, and that to the extent that the agreement dealt with real property, it was appellees' real property and, therefore, the property was not subject to the bankruptcy court's jurisdiction. Thereafter, appellant appealed this decision.

Utimately, appellant raised the following issues in her appeal from various determinations by the bankruptcy court: 1) appellees' motion for approval of compromise and settlement was not brought in compliance with Bankruptcy Rule 9019; 2) the bankruptcy court disregarded appellant's notice of rescission and her opposition when it granted the motion for approval of compromise and settlement; 3) the bankruptcy court improperly granted appellees' motion for approval of compromise and settlement; 4) the bankruptcy court abused judicial procedure by failing

to analyze whether the settlement was in the estate's best interest; 5) the bankruptcy court did not have jurisdiction to consider the motion for approval of compromise and settlement because an appeal was pending before BAP; 6) the bankruptcy court did not have jurisdiction to grant the motions to expunge lis pendens; 7) appellees' "clear violations of the stay provisions" were ignored by the bankruptcy court; 8) the bankruptcy court could not issue an order relating to the real property because it did not have jurisdiction; 9) the bankruptcy judge improperly issued orders without submitting proposed findings and conclusions to the district court for de novo review; 10) the bankruptcy court disregarded the legal effect of a motion to amend or alter judgment under F.R.Civ.P. 59(e) throughout the proceedings; 11) the bankruptcy court did not have the power to expunge the filed lis pendens on the property

since the property was still part of the estate pursuant to appellant's theory that the automatic stay did not terminate; 12) the bankruptcy judge abused his discretion by saying that the lis pendens filing was "not only improper, but perhaps contemptuous misconduct"; and 13) the bankruptcy judge's statement as set forth above was threatening and therefore the statement violated her due process rights.

In affirming the decisions of the bankruptcy court challenged by appellant, this court concluded in its order of December 12, 1989 that: 10 the automatic stay terminated upon dismissal of Weston I, and the subsequent foreclosure sale of appellant's property was therefore not in violation of the automatic stay; 2) matters on appeal relating to the real property were moot because the real property was sold when no stay was in effect and this court was unable to grant appellant

effective relief; 3) the bankruptcy court had jurisdiction to approve the settlement and compromise agreement between appellant and appellees because Weston II was still pending when the motion for approval was brought before the bankruptcy court; 4) the bankruptcy court did not abuse its discretion when, considering the circumstances surrounding the controversy, it approved the settlement and compromise agreement; and 5) expungement of a lis pendens is collateral to issues determined in the underlying action and therefore the bankruptcy court had jurisdiction to expunge appellant's lis pendens.

Appellant now moves for reconsideration on the following grounds: 1) the court misconstrued appellant's contentions about the validity of appellees' foreclosure sale; 2) issues regarding the real property are not moot because the foreclosure sales were not valid, and furthermore, the matter is

governed by the doctrine of "law of the case"; 3) the bankruptcy court was divested of jurisdiction to hear the motion for approval of compromise in Weston II because an appeal was pending before BAP that dealt with issues regarding valid title to the property and claims against appellees based on the foreclosure sales; 4) the bankruptcy court also used improper procedure when it approved the compromise; 5) this court was in error when it said the bankruptcy court had jurisdiction to expunge the lis pendens; and 6) the court did not address the following issues raised by appellant in her appeal: a) only a trustee can bring a motion to approve a compromise under Bankruptcy Rule 9019; b) appellees violated the stay provisions of Bankruptcy Rule 7062 when they recorded settlement documents within three days of the entry of the bankruptcy court's order approving settlement; c) a non-Article III judge

cannot issue a non-appealable order such as the order expunging lis pendens; and d) this court did not consider the effect of a timely Rule 59(e) motion on either the dismissal of the first bankruptcy case or the order approving settlement.

II. **ANALYSIS**

A motion for reconsideration is proper where the moving party can show new or different facts or circumstances not existing or not shown previously or can establish other grounds for the motion.

The issues appellant raises in her request for reconsideration are, for the most part, a reiteration of the arguments she presented during the court's original determination of her appeal. However, one issue warrants reconsideration because, although the court believes it implicitly decided the issue, it was not directly addressed in the court's previous order.

Appellant contends that this court

misconstrued the theory under which she was challenging the validity of the appellees' foreclosure sale. She states that she was not contending that the automatic stay in Weston I continued during the time of her appeal because the initial dismissal was null and void, and, therefore, the automatic stay never lapsed. Instead, she argues that the foreclosure sale was void because it took place while her motion for reconsideration of the bankruptcy court's sua sponte order of dismissal on January 14, 1986 was pending, and the automatic stay was consequently still effective.

As appellant rightly points out, Bankruptcy Rule 9023, dealing with post-trial motions, is derived from Rule 59(e) of Federal Rules of Civil Procedure.[1] Apellant is also correct when she says that

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[1] Bankruptcy Rule 9023 states: "Rule 59 F.R.Civ. P. applies in cases under the Code ...."

while a motion for reconsideration is pending, no appeal may be filed. However, appellant confuses doctrines developed to aid in determining when a judgment is final for purposes of appeal with those determining the finality of a judgment for other purposes.

Rule 59(e) provides that a motion to alter or amend a judgment shall be served within ten days after entry of the judgment. Bankruptcy Rule 8002(b)(3) states, in pertinent part:

> If a timely motion is filed by any party ... under Rule 9023 to alter or amend the judgment ... the time for appeal for all parties shall run from the entry of the order ... granting or denying any ... such motion.

All but one of the cases cited by appellant in support of her argument deal with the issue of when a party can file an appeal, and they hold that a timely motion for rehearing or reconsideration automatically suspends the finality of the order

for purposes of appeal. See, e.g., In re Shah, 859 F.2d 1463 (10th Cir. 1988); Creative Data Forms, Inc. v. Pennsylvania Minority Business Development Authority, 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3rd Cir. 1986); Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986); In re Curry and Sorenson, Inc., 57 B.R. 824 (9th Cir. BAP 1986). The one case that did not deal with the finality of a judgment for appeal purposes was a case involving res judicata. See Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989). Because an issue previously decided by the bankruptcy court was under reconsideration by the same court, a party was not barred from litigating the same claim in another court. Id at 1180. The Lockard court itself recognized the similarity of the finality requirement for purposes of claim preclusion and the concept of finality for purposes of appellate

review. Id, citing Restatement (Second) of Judgments § 13, comment b.

After judgment is entered, there is an automatic ten-day stay of proceedings to execute or enforce a judgment. Fed.R. Civ.P. 82(a); Bankruptcy Rule 7062. Furthermore, a party who seeks reconsideration after judgment is entered has the option of seeking a stay beyond the automatic ten-day stay, pending disposition of its motion for reconsideration. Fed. R.Civ.P. 62(b); Bankruptcy Rule 7062.

When appellant's bankruptcy case was dismissed, the automatic stay terminated. See Order of December 12, 1989 at 7-12; In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983); Olson v. Commissioner, 86 T.C. 1314 (1986). Appellant did not obtain a stay pending her motion for reconsideration or a stay pending appeal. While the motion for reconsideration was pending, and after the automatic ten-day stay under

Bankruptcy Rule 7062 had run, appellees proceeded with their foreclosure sale. The foreclosure did not violate the automatic stay provided by 11 U.S.C. § 362 because that stay was not in effect at the time the foreclosure took place. Futhermore it did not violate the automatic ten-day stay after entry of judgment, provided under Bankruptcy Rule 7062, because the order dismissing Weston I was entered January 14m 1986, and the foreclosure sale did not take place until February 24.

Accordingly, based on the reasoning set forth above, IT IS ORDERED:

1. That appellant's motion for reconsideration of the court's order of December 12, 1989 is GRANTED; and

2. That the order of December 12, 1989 affirming orders of the bankruptcy court is hereby RECONFIRMED.

Dated: August 27, 1990

/s/ Milton L. Schwartz
United State District Judge

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

JOANNE M. WESTON,
Appellant

v.

FRANKLIN S. CIBULA,
a Law Corporation,
Appellees.

_____/

BAP EC-89-1604-MeAsJ

Bk. No. 285-00957-R11
(286-05445-R11)

MEMORANDUM

(Entered January 18, 1991)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

This is an appeal by a debtor from the denial of a motion for an order vacating a default judgment on the ground that it was obtained in violation of the automatic stay.

Appellee Frank S. Cibula, a Law Corporation ("Cibula"), filed suit in state court against Joanne M. Weston ("Debtor") to obtain legal fees owed. When she had six days remaining to answer the complaint, she filed bankruptcy. The bankruptcy case was dismissed sua sponte by the trial court on January 14, 1986. On January 15, 1986,

Cibula obtained a default judgment against Debtor and on January 18, 1986, he recorded a lien against her cause of action Joanne M. Weston v. Shasta Terra, Inc., et al. [No. 352856, Siskiyou County Superior Court]. The bankruptcy case was later reinstated following an appeal to the Bankruptcy Appellate Panel in which the Panel held that the dismissal was void because the motion to dismiss was not brought by a party in interest or the United States Trustee. 11 U.S.C. §1112(b). The case was reinstated on May 20, 1988 and consolidated with the Chapter 11 case which Debtor had filed on October 24, 1986, following dismissal of the original action. Debtor then moved the bankruptcy court to vacate the default judgment. That motion and subsequent motions for reconsideration were denied and this appeal followed.

The issue presented in this appeal is whether actions taken by a creditor during

the period between the improper dismissal of a bankruptcy case and its reinstatement ("gap period") should be set aside for being in violation of the automatic stay.

In an appeal involving another creditor, the Debtor presented the same arguments before the District Court for the Eastern District of California, which rejected them in In re Weston, 110 B.R. 452 (E.D. Cal. 1989) (currently pending appeal before Ninth Circuit Court of Appeals on Notice of Appeal filed September 27, 1990). See In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983). In light of the District Court decision and for the reasons stated in the excellent opinion of the trial court, In re Weston, 101 B.R. 202 (E.Cal.[sic] 1989), we reject the Debtor's arguments presented in this appeal.

AFFIRM.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

BAP EC-89-1604-MeAsJ

JOANNE M. WESTON,
Appellant,

Bk. No. 285-00957-R11
(286-05445-R11)

v.

FRANKLIN S. CIBULA,
a Law Corporation,

ORDER

_____/

(Entered February 13, 1991)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

The Appellant's Motion For Rehearing is hereby ORDERED DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Entered September 1, 1992)

In re:

Weston v. Rodriguez _____/ Case No. 90-16501
D.C. CV 88-1441-MLS

and

Weston v. Cibula _____/ Case No. 91-15360
BAP EC 89-1604-MeAsJ

(Consolidated by the Court)

Before: NORRIS, BEEZER and LEAVY,
Circuit Judges

The petition for rehearing is denied.

The pertinent text of Rule 55, Federal Rules of Civil Procedure, states:

> (b)(2) ... If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application....

The pertinent text of FRBP 9019 state:

> (a) Compromise. On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustee as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

FILED
DEC 2 1992
OFFICE OF THE CLERK

No. 92-782

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

ROBERT R. & FEROL M. RODRIGUEZ;
FRANKLIN S. CIBULA, A LAW CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION RESTATED

The sole issue in this case is whether a state court judgment against Petitioner Joanne M. Weston and the attachment of a judgment lien against her property within ten days after entry of an order dismissing her Chapter 11 bankruptcy violated the ten day stay against enforcing judgments imposed by Federal Rule of Bankruptcy Procedure 7062.

TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
SUMMARY OF ARGUMENT	5
REASONS TO DENY WRIT	6
CONCLUSION	12

TABLE OF AUTHORITIES

CASES **Page(s)**

In re Barnes,
119 B.R. 552 (D.C.S.D. Ohio 1988).. 11

In re Saez,
13 B.R. 605 (Bkrtcy D.P.R. 1981)... 10

In re Saez,
721 F.2d 848 (1st Cir. 1983) 9, 11

In the Matter of Bluford,
40 B.R. 640 (Bkrtcy W.D. Mo. 1984). 11

STATUTES

11 U.S.C. § 349(b) 6,8,9,12

11 U.S.C. § 362(a) 8

11 U.S.C. § 362(c)(2)(B) 6,8,12

11 U.S.C. § 1112(b) 4

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 101.(a) 5

FEDERAL RULES OF BANKRUPTCY PROCEDURE

7062 5,6,10,12
8005 3
9021 8

FEDERAL RULES OF CIVIL PROCEDURE

58 8
62(a) 5,6,7,12

TABLE OF AUTHORITIES (CONTINUED)

MISCELLANEOUS

Bankruptcy Act Rule 10

11 Wright & Miller, Federal Practice and Procedure, section 2901 7

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 337-38 (1977) 9

S. Rep. No. 95-989, 95th Cong., 2d Sess. 48-49 (1978) 9

No. 92-782

In The

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ROBERT R. & FEROL M. RODRIGUEZ;
FRANKLIN S. CIBULA, A LAW CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF CASE

In February 1983 Joanne M. Weston ("Weston") hired Franklin S. Cibula, a Law

Corporation ("Cibula"), as legal counsel to assist her in certain disputes. (A.9) Weston terminated Cibula's employment in December of 1984. (A.9) On February 19, 1985, Cibula served Weston with a Shasta County Municipal Court complaint which sought payment of $11,715.36 of unpaid attorneys' fees. The complaint was served on Weston on February 19, 1985. Shortly before her answer was due, Weston commenced a bankruptcy proceeding in the Eastern District of California (Case No. 285-00957-B-11) on March 15, 1985. (A.9-10)

On January 14, 1986, the bankruptcy court dismissed Weston's bankruptcy petition due to her unreasonable delay in proposing a plan of reorganization. (A.10) Although properly notified of the bankruptcy court's order dismissing her original Chapter 11 case, Weston never

moved for a stay pending appeal as provided for in Federal Rule of Bankruptcy Procedure 8005. On January 15, 1986, Cibula filed for and received a default judgment against Weston in the Shasta County Municipal Court. (A.10) The following day, on January 17, 1986, Cibula obtained a lien on Weston's cause of action in the matter of Joanne M. Weston v. Shasta Terra, Inc., et al., Case No. 352856, Siskiyou County Superior Court, and filed an abstract of judgment in the official records of Siskiyou and Tehema Counties. (A.10)

On January 28, 1986, Weston filed a motion requesting the bankruptcy court to reconsider its order dismissing her original Chapter 11 petition. That motion was denied on February 24, 1986, and Weston thereafter filed an appeal with the Bankruptcy Appellate Panel for the Ninth

Circuit. On May 20, 1988, the Bankruptcy Appellate Panel overturned the bankruptcy court's order. The Bankruptcy Appellate Panel apparently found that the bankruptcy court's dismissal was unauthorized by 11 U.S.C. §1112(b) because the application to dismiss was made by the court's estate administrator rather than by a "party in interest" as required by that section. (A.11)

While the Bankruptcy Appellate Panel had Weston's appeal under submission, on October 27, 1986, Weston filed a second Chapter 11 proceeding in the Eastern District of California (Case No. 286-05445-B-11). (A.26) Therefore, when Cibula obtained a default judgment against Weston and obtained judgment liens against her property, neither the original nor subsequent Chapter 11 proceeding were pending before the bankruptcy court.

SUMMARY OF ARGUMENT

This case does not merit review under any of the standards set forth in this Court's Rule 10.1(a). The sole issue in this case is whether a state court judgment against Petitioner Joanne M. Weston and the attachment of a judgment lien against her property within ten days after entry of an order dismissing her Chapter 11 bankruptcy violated the ten day stay against enforcing judgments imposed by Federal Rule of Bankruptcy Procedure 7062. The Court of Appeals correctly concluded that Federal Rule of Bankruptcy Procedure 7062(a), which incorporates Federal Rule of Civil Procedure 62(a), did not bar Respondent Franklin S. Cibula, a Law Corporation, from obtaining a state court judgment and judgment lien within ten days of the dismissal of the Petitioner's bankruptcy petition. Such a

judgment and judgment lien did not amount to an execution of the dismissal order nor was it a proceeding taken by the bankruptcy court to enforce its dismissal order. Also, 11 U.S.C. §§ 362(c)(2)(B) and 349(b) provide that, upon dismissal of a bankruptcy proceeding, the case is immediately terminated and all parties return to the position they were in immediately prior to the commencement of the bankruptcy.

REASONS TO DENY THE WRIT

THE TEN DAY STAY IMPOSED BY FEDERAL RULE OF BANKRUPTCY PROCEDURE 7062(a) HAS NO APPLICABILITY, IN THE CONTEXT OF THIS CASE, TO AN ORDER DISMISSING A BANKRUPTCY PROCEEDING.

Federal Rule of Bankruptcy Procedure 7062(a) is based upon Federal Rule of Civil Procedure 62(a) which provides in relevant part:

> Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its

> enforcement until the expiration of ten days after its entry . . . .

Federal Rule of Civil Procedure 62(a) stays proceedings to enforce a judgment. "The rule does not govern stays in proceedings other than to enforce a judgment." 11 Wright & Miller, Federal Practice and Procedure, § 2901. The bankruptcy court correctly noted that "such an exception is superfluous in the context of an order dismissing a complaint as such a judgment generally eliminates a cause of action rather than rendering one enforceable." (A.20) When the bankruptcy court dismissed Weston's original Chapter 11 proceeding, Cibula sought no process or writ from the bankruptcy court to enforce or implement the bankruptcy court's order of dismissal. Instead, Cibula simply returned to state court.

Cibula's actions were in accord with

the relevant provisions of the Bankruptcy Code. 11 U.S.C. §362(c)(2)(B) provides that the automatic stay of 11 U.S.C. §362(a) is terminated at the moment an order dismissing a case is entered upon the docket. Federal Rule of Bankruptcy Procedure 9021; Federal Rule of Civil Procedure 58.

Also, 11 U.S.C. §349(b) describes the effect of an order of dismissal. That section provides in relevant part:

> Unless the court, for cause, orders otherwise, dismissal of the case other than under section 742 of this title . . .
>
> (1) reinstates --
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 542, 544, 545, 547,548, 549 or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(k)(1), 542, 550, or 553 of this title;

> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The legislative history of section 349(b) indicates that the basic purpose of this section was to "undo the bankruptcy case, as far as practicable, and restore all property rights to the position in which they were found at the commencement of the case." (H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 337-38 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 48-49 (1978)).

The result reached by the bankruptcy court in this case is identical to the result in In re Saez, 721 F.2d 848 (1st Cir. 1983). In Saez, the First Circuit considered the issue of whether dismissal of a Chapter 13 petition was automatically stayed for ten days. In that case, the bankruptcy court had entered an order

dismissing the debtor's Chapter 13 petition for "failure to prosecute" the bankruptcy. Within ten days of the dismissal, a creditor conducted a foreclosure sale of the debtor's residence.

The bankruptcy court in Saez later granted a motion for reconsideration and held that, although the automatic stay ceased to protect the debtor upon dismissal of the case, the creditors were nonetheless in violation of Bankruptcy Act Rule 762, the predecessor of Federal Rule of Bankruptcy Procedure 7062, because the foreclosure of the debtor's property occurred within ten days of the order dismissing the case. In re Saez, 13 B.R. 605, 606-607 (Bankr. D.P.R. 1981). The bankruptcy court concluded, therefore, that the sale of the debtor's property was null and void.

On appeal, the First Circuit reversed the bankruptcy court. The First Circuit found that Rule 762 did not apply to an order dismissing a case for failure to diligently prosecute the bankruptcy case. In reaching this conclusion, the First Circuit reasoned that although Rule 762 applied in adversary proceedings as well as to "all proceedings relating to a contested petition and in all proceedings to vacate an adjudication", an order to dismiss for failure to prosecute did not qualify as either. Consequently, the First Circuit found that Rule 762 did not govern an order entered upon a motion to dismiss for failure to prosecute. In re Saez, supra, 721 F.2d at 852; see also, In the Matter of Bluford, 40 B.R. 640 (Bankr. W.D. Mo. 1984); In re Barnes, 119 B.R. 552, 555 (D.C.S.D. Ohio 1988).

CONCLUSION

It is respectfully submitted that the court should not exercise its discretionary jurisdiction in this case. This case involves a straightforward application of Federal Rule of Bankruptcy Procedure 7062 and Federal Rule of Civil Procedure 62(a). These rules have no applicability in the context of this case. In this case, Weston's bankruptcy petition was dismissed and Cibula returned to state court in order to exercise his state court remedies. The bankruptcy court was not called upon to issue a writ of execution, commence any proceeding, or otherwise enforce its order of dismissal. The right of Cibula to return to state court once the bankruptcy was dismissed is recognized by 11 U.S.C. §362(c)(2)(B) and 11 U.S.C. §349(b).

Certiorari should be denied.

Dated: December 1, 1992

Respectfully submitted,

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